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No. 08-183

Supreme Court, U.S.
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In The
Supreme Court of the United States

HERITAGE COAL COMPANY, LLC,
formerly Peabody Coal Company, LLC,

Petitioner,

v.

AMBROSIA LAND INVESTMENTS, LLC,
formerly Wilke Window & ~~Door~~ Company, Inc. and
ILLINOIS MINE SUBSIDENCE INSURANCE FUND,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF ILLINOIS MINE SUBSIDENCE INSURANCE FUND

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RULE 29.6 DISCLOSURE

Illinois Mine Subsidence Insurance Fund was created in 1979 by the Illinois General Assembly as a reinsurer for mine subsidence insurance pursuant to 215 ILCS 5/801.1.

5/801.1. Purpose

> §801.1 Purpose. The purpose of this Article is to require insurers to make mine subsidence insurance coverage available for residences, living units and commercial buildings located in Illinois; to establish the Illinois Mine Subsidence Insurance Fund; to divide the Fund into separate residential and commercial sub-funds; and to make the Fund the reinsurer for the mine subsidence insurance made available under this Article.

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ARGUMENT

The Petition should be denied because there are no compelling reasons for it to be granted. The Petition fails to meet any of the tests set forth in United States Supreme Court Rule 10. The issue decided by the U.S. Court of Appeals for the Seventh Circuit was whether the Illinois statute of repose was a valid affirmative defense to Plaintiffs' claims for damage caused by mine subsidence.[1] The Court of Appeals held that it was not. That decision does not conflict with another Court of Appeals decision and federal law is not at issue. The Seventh Circuit decision also does not conflict with a subsequently decided Illinois Supreme Court opinion and there is also no need for this Court to exercise its supervisory power because the Court of Appeals appropriately exercised its discretion and did not depart from the accepted and usual course of judicial proceedings.

As noted by the Seventh Circuit, it has long been the law that a Court of Appeals may address legal issues not addressed by a district court when the facts on which those conclusions are based are not in dispute. (Pet. App. p. 17a). The facts are not in dispute here.

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[1] The Illinois statute of repose is an affirmative defense, and was pleaded as such by Petitioner. It was Petitioner's burden to establish that it was entitled to the protection of the Statute, and thus to show that it engaged in activities which brought it within the Statute. *C.S. Johnson Co. v. Champaign Nat'l Bank*, 126 Ill.App.3d 508, 511, 467 N.E.2d 363 (1984).

Petitioner asserts repeatedly in its first argument that this is a case of first impression. (Pet. pp. 5-7, 9). That claim is wrong insofar as Petitioner objects to the Court of Appeals' opinion. While this was a case of first impression as to whether the excavation of coal from an underground coal mine was "construction of an improvement to real property" within the meaning of the Illinois statute of repose, Petitioner prevailed on that issue. (Pet. App. pp. 7a-12a).

The Court of Appeals decision was not a matter of first impression on the issues decided adversely to Petitioner. That application of the Illinois statute of repose involved a two-step analysis under Illinois law was not a matter of first impression. (Pet. App. 6a). That the statute of repose does not apply to suits against landowners solely as owners was not a matter of first impression. (Pet. App. pp. 15a, 16a). The Court of Appeals decision on those issues was based on well-established Illinois case law, which the Court of Appeals cited and which Petitioner does not challenge. Contrary to Petitioner's assertion, the Court of Appeals did not "conjure up its own reasons" for reversing the District Court. (Pet. p. 6).

While Petitioner claims that the Court of Appeals overreached, it does not dispute the authorities cited by the Court of Appeals. The Seventh Circuit stated, correctly, that it was entitled to exercise its discretionary review powers where the record was fully developed and the issue presented purely legal questions. (Pet. App. pp. 17a, 18a). The Court of Appeals'

power to do so in this case is supported not only by the authorities it cited, but also by *Stetson v. Howard D. Wolf & Associates*, 955 F.2d 847, 850 (2nd Cir. 1992) and *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1538, 1539 (10th Cir. 1996).

Petitioner's second argument is nothing more than a semantic quibble, despite its protestations to the contrary. While Petitioner claims that withdrawal of coal is not wrongful, Illinois law is to the contrary. As the Illinois Supreme Court stated, if "the removal of any" coal causes loss of the necessary surface support, the entity removing the coal is liable to the surface landowner. *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 468, 71 N.E. 335 (1904). It is obvious that it is the removal of coal which creates the conditions necessary for mine subsidence. Without removal, there could be no subsidence.

Petitioner's claim that the Court of Appeals' decision undercuts Illinois law, as set forth in *Am. Nat'l Bk. & Trust Co. v. Booth/Hansen*, 186 Ill.App.3d 865, 542 N.E.2d 925 (1989), *Commonwealth Edison Co. v. Walsh Const. Co.*, 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) and *Continental Ins. Co. v. Walsh Const. Co.*, 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) is also wrong. (Pet. pp. 11 n.3; 16). The defendants in all of those cases were hired for and engaged in the construction process, and thus entitled to the protections of the statute of repose. None of the defendants were owners of the subjacent land, and

thus were not sued as owners. The Court of Appeals decision has no effect on those decisions.

CONCLUSION

There is simply no compelling reason for this Court to review this question of Illinois law, and the Petition should be denied.

Respectfully submitted,

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